Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of

Carriage of the Transmissions of
Digital Broadcast Stations

CS Docket No. 98-120

COMMENTS OF
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.

Association of Local Television Stations, Inc.
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 887-1970

October 13, 1998

Executive Summary

For over a decade the broadcasting industry and the Federal Communications Commission have labored to bring free, over-the-air digital television to the American people. All of these efforts will be in vain if cable operators refuse to carry local digital television stations. Make no mistake, as video gatekeepers cable operators have the ability to undermine the deployment of over-the-air digital television in the United States. History demonstrates that the cable industry will act to deny carriage to local television stations. The FCC should not cede its authority and permit cable to control the pace of DTV deployment.

An economic analysis prepared by Strategic Policy Research, Inc. documents the necessity of enacting must carry for digital television stations. Failure to adopt these rules will: (1) undermine Congressional objectives, (2) harm consumers, and (3) thwart broadcasters efforts to make free, over-the-air digital television a reality.

The FCC should enact general rules requiring cable operators to carry all local digital television stations throughout a station's local market. Pursuant to these rules, any cable operator transporting a digital video signal from any source would be required to carry the signals of all local digital television stations. Thus, if a cable operator is providing a digital cable service, it must provide carriage for all local digital television signals. This requirement would also apply to analog cable systems providing pass-through transport of a digital signal. Finally, larger analog cable systems would be subject to these must carry requirements. The exemption for small cable systems should be extended to the digital arena on a case by case basis.

Cable operators should not deny the American public the benefits of high definition television by unilaterally stripping out or reformatting these signals. Must carry protections should extend to all free, over-the-air services provided by local television stations, including multiple channel offerings. Channel positioning, menu, and navigation rules should be adopted to ensure local digital television stations do not become objects of competitive discrimination.

Local digital television stations should have the option of asserting their rights to retransmission consent or selecting must carry protection. Local stations should be given the flexibility to make separate elections for their analog and digital signals. Regardless of the election, all local digital broadcast stations should be placed on the basic tier.

Since 1985, the cable industry has opposed signal carriage rules for local television stations. For nearly a decade the cable industry has claimed that popular cable channels would have to be eliminated and the First Amendment would be violated. As the *Turner II* Court found, none of these claims proved to be true.

The FCC should move forward now! Past mistakes should not be repeated. If the FCC truly wants a timely deployment of free, local, over-the-air digital television, then it should enact must carry and retransmission consent rules today!

Table of Contents

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of

Carriage of the Transmissions of
Digital Broadcast Stations

CS Docket No. 98-120

COMMENTS OF
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.

The Association of Local Television Stations, Inc. ("ALTV"), hereby submits its comments in response to the Commission's *Notice of Proposed Rule Making* in the above-captioned proceeding.[1] ALTV is a non-profit, incorporated association of local television stations. "Local television stations" as referred to herein includes stations not affiliated with the ABC, CBS, or NBC television network, but only truly independent stations and local television stations affiliated with the Fox, PaxTV, UPN, and WB networks. Many of ALTV's member stations have been direct beneficiaries of the must carry rules. The thrust of these comments is to assure that their DTV signals also remain free of interdiction by cable television systems in their markets and to preserve for their viewers, cable and noncable alike, the benefits of free, broadcast television service into the digital age.

---

[1] *Notice of Proposed Rule Making* , CS Docket No. 98-120, FCC 98-153 (released July 10, 1998) [hereinafter cited as *Notice*]. For ease of reference, ALTV's comments track the outline of issues as specified in the Commission's *Notice*.

I. INTRODUCTION

At the outset, ALTV wishes to remind the Commission of vital contextual elements which ought remain in view as the Commission deliberates on the issue of DTV must carry.

- **The Commission might easily lose sight of the forest for the trees.**

  In a world where nearly two-thirds of television viewers rely on cable television as the conduit for reception of broadcast signals, cable systems' failure to carry local television stations' DTV signals will have a devastating effect on the ability of those local stations to attract viewers to their DTV signals. The fall out of a cable industry failure to carry all local DTV signals would unravel the Commission's efforts to promote a successful -- and expeditious -- transition from analog to DTV broadcasting would be enormous. In the words of former FCC Chief Economist John Haring, a reluctance on the Commission's part to adopt effective must carry rules during the transition "would amount to a regulatory 'Bay of Pigs' -- lack of must carry 'air cover' leaving broadcaster investments in digital capabilities exposed to cable monopoly 'firepower' on the beaches."[2]

- **Congress has concluded and the Court has affirmed that voluntary cable carriage of *most* stations fails to preserve an adequate level of broadcast television service.**

  In rejecting the cable industry's constitutional challenge to the must carry law, the Court was unimpressed by the cable industry's "suggestion that legitimate legislative goals would be satisfied by the preservation of a rump broadcasting industry providing a minimum of broadcast service to Americans without cable."[3] In short, cable and non-cable viewers alike have an interest in receiving local broadcast DTV signals from Fox, PaxTV, UPN, and WB affiliates, and independent stations, just as much as they have an interest in the DTV signals of ABC, CBS, and NBC affiliates.

---

[2]Haring, John, Strategic Policy Research, *The Economic Case for Digital Broadcast Carriage Requirements*, (October 13, 1998) at 14 [hereinafter cited as *Economic Case*].

[3]*Turner Broadcasting Company v. Federal Communications Commission*, 1997 LEXIS 2078, 23-24 (1997)[hereinafter cited as *Turner II*].

- **Broadcasters face enormous costs in the transition with virtually no hope of any return in the near term.**

  John Malone of TCI (himself no shrinking violet on the subject at hand) stated it so aptly:

  > They've got huge costs and no incremental revenue. So why is high-def a good economic proposition for a broadcaster? Give me any business model that says it's not just a cost center, a big loser. At best, they retain parity, because cable networks will clearly go high-def in a spectrum efficient way.[4]

  Stations may face spending more than they are worth to transition to DTV. Royce Yudkoff, managing partner of ABRY Partners, points out that, "A lot of smaller owners wonder whether it makes sense to stay in the business."[5] As Haring warns, "The digital transition is not likely to prove easy or painless in the best of circumstances."[6]

- **Broadcasters' digital landing craft set off in a sea of uncertainty.**

  As the Commission recently observed, "At this time...it is unclear how DTV will develop as a broadcast service for consumers."[7] Haring also states:

  > Collectively, broadcasters are betting billions of dollars on a digital future, but success is far from assured. Indeed, how precisely the new technical capabilities will be utilized and what specific kinds of services they will provide remain largely to be determined as the result of market experimentation and development still largely in the offing. At the same time, there also remain a variety of serious technical and economic challenges that must be effectively addressed if the new digital service is to be a success. In this regard there are

---

[4]"TCI's Malone Discusses HDTV and Must carry at NCTA Convention," (May 5, 1998) at 6.

[5]"HDTV hits broadcasters in the wallet," *USA Today* [On line] (posted November 17, 1997) at 2.

[6]*Economic Case* at 13.

[7]*Fourth Annual Report*, CS Docket No. 97-141 (January 13, 1998) at ¶95 [hereinafter cited as *Fourth Annual Competition Report*].

important steps that regulation must take to ensure an at least minimally bumpy (if not a smooth) transition.[8]

Bob Wright, NBC president, notes similarly that, "The business plans for high-definition broadcasting are pretty skinny right now."[9] As Meredith CEO William Kerr mused recently, "[W]e haven't figured out a way to make any money."[10] Despite the uncertainty facing local broadcast stations, they find themselves on a forced march to an arbitrary deadline for a complete transition to DTV.

- **Broadcast television is not just another video medium.**

  Broadcast television's universal availability, appeal, and the programs it provides -- for example, entertainment, sports, local and national news, election results, weather advisories, access for candidates and public interest programming such as education television for children -- have made broadcast television a vital service.[11]

  As the Commission also has been quick to reiterate, "digital broadcasters remain public trustees with a responsibility to serve the public interest."[12] The Commission subsequently reiterated "that, with respect to digital television service, broadcast licensees and the public are on notice that existing public interest requirements continue to apply to *all* broadcast licensees and that we may adopt new public interest rules for digital television, foreclosing nothing with respect to the public interest from our consideration."[13]

---

[8] *Economic Case* at 2.

[9] "The Two Sides of HDTV: Which Will Go First?" *CyberTimes* (August 29, 1997) at 2.

[10] "HDTV hits broadcasters in the wallet," *USA Today* [On line] (posted November 17, 1997) at 1.

[11] *Fifth Report and Order,* MM Docket No. 87-268, 12 FCC Rcd 12808 (1997), at ¶27 [hereinafter cited as *Fifth Report and Order*].

[12] *Fifth Report and Order* at ¶2.

[13] *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order,* MM Docket No. 87-268, FCC 98-23 (released February 23, 1998) at ¶36 [hereinafter cited as *Reconsideration of the Fifth Report and Order*].

- **Unlike cable television and other multichannel video program distributors (MVPDs), broadcast television service is "available free of charge to anyone who owns a television set, currently 98% of the population."**[14]

  In fact the Commission has insisted it remain so, requiring "broadcasters to provide on their digital channel the free over-the-air television service on which the public has come to rely."[15]

- **Analog broadcasting rests on an eroding base.**

  Again, John Malone:

  > If you are a single network in a 164-channel world, you are going to lose market share.The advertising revenues are going to be under pressure. Unless you have more than one channel, your economics will deteriorate.[16]

  Says Mel Karmizan, noting the perception that the network business is a loser that's getting squeezed by skyrocketing compensation payments to affiliates, escalating program costs and eroding audiences, "It's a very difficult business model."[17] Yet, this one-channel competitor, is asked to finance a second facility and upgrade their studio, production, and newsgathering capabilities to digital in a few short years.

- **Cable systems again have a government granted advantage in the digital competition.**

  Cable systems may sell their subscribers broadcast programming without paying a dime to the copyright owners of that programming.[18] As the Commission once acknowledged:

---

[14] *Fifth Report and Order* at ¶¶27-28.

[15] *Fifth Report and Order* at ¶¶27-28.

[16] "Malone positioning TCI as gatekeeper," *Electronic Media* (April 20, 1998) at 36.

[17] *Electronic Media* Daily Fax (October 1, 1998) at 1.

[18] 17 USC §111.

> [T]he lack of must carry obligations, especially with the effect of the compulsory license, creates an imbalance between broadcasting and cable television.[19]

In the 60s and 70s, broadcasters watched with chagrin as cable systems built their industry with broadcast signals which they used at below marketplace cost (no cost for popular local signals). The absence of DTV must carry rules, again, would permit cable systems to enhance the attractiveness of their digital tiers with popular broadcast programming, but with no concomitant obligation to restore the lost balance in their competitive relationship with local broadcast stations.

- **History is a severe teacher.**

  In the analog world, Congress and the Commission learned the hard way that must carry rules were essential to the survival of the nationwide system of local broadcast television stations engendered by the Communications Act of 1934. Lack of cable carriage led many stations to the brink of failure; some did fail.[20] History, however, hardly is destined to repeat itself. Only if the Commission lets itself be distracted by the trees and fails to see the forest will the success of DTV broadcasting and an expeditious transition be jeopardized by purely self-serving carriage decisions by cable television systems.

These points should assist the Commission maintain its bearings in this forest where cable operators attempt to draw its attention to the trees. Whereas the current debate over DTV must carry rules includes some additional issues at the periphery, the core consideration remains the same -- whether cable operators or consumers will decide which DTV broadcast stations succeed in the new digital marketplace.

---

[19] *Report*, MM Docket No. 89-600, FCC 90-276 (released July 31, 1990) at ¶¶153-154.

[20] *See Turner II*, 1997 LEXIS 2078 at 41-54.

II. LEGAL CONTEXT

A. The Commission is Required to Adopt and Enforce Rules Mandating Immediate Cable Carriage of Local Television Stations' DTV Signals.

Section 614 of the Communications Act mandates carriage of local television stations' DTV signals. Section 614(a) provides that cable operators "shall carry...the signals of local commercial television stations...."[21] The term "local commercial television station" encompasses "any full power broadcast station...licensed and operating on a channel regularly assigned to its community by the Commission...."[22] A local television stations' DTV signal easily falls within the scope of these provisions. First, a local television station's DTV signal is a "signal of a local commercial television station." Second, local television stations' DTV signals, like their analog signals, are transmitted by a "full power broadcast station...licensed and operating on a channel regularly assigned to its community by the Commission...."[23] Indeed, the analog and digital signals are licensed together.[24] The plain, unambiguous language of the provision, therefore, includes DTV as well as analog signals under the protection of the statutory requirement.

---

[21] 47 USC §534(a).

[22] 47 USC §534(h)(1)(A).

[23] 47 USC §534(h)(1)(A). The DTV signal also, of course, is transmitted on a "channel regularly assigned to its community by the Commission." *Id.* In the *Sixth Report and Order*, MM Docket No. 87-268, 12 FCC Rcd 14588 (1997)[hereinafter cited as *Sixth Report and Order*], *mod.on reconsideration, Memorandum Opinion and Order of the Sixth Report and Order*, MM Docket No. 87-268, (1998) [hereinafter cited as *reconsideration of Sixth Report and Order*], the Commission permanently assigned the channels for DTV facilities to communities throughout the country. Thus, no doubt may arise that these DTV channels are somehow less "regularly assigned" than their analog counterparts. ALTV also notes the coincidence in that the first assignment of television channels to communities across the country was embodied in another *Sixth Report and Order*, 41 FCC 148 (1952).

[24] *Fifth Report and Order* at ¶59.

Furthermore, the statute expressly contemplates carriage of local television stations' DTV signals. Section 614(b)(4)(B) addresses the quality of signals required to be carried. With respect to advanced television (now DTV), Congress directed the Commission to "initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to *ensure cable carriage of such broadcast signals of local commercial television stations....*"[25] Such a proceeding would be unnecessary if Congress had not contemplated a must carry requirement applicable to DTV as well as analog signals.

Finally, nowhere in the provision are DTV signals excluded. Section 614(h)(1)(B) includes specific exclusions from the definition of "local commercial television station."[26] Low power stations, distant signals, and stations which fail to deliver a signal of requisite strength to the cable head-end are excluded.[27] However, no mention is made of DTV signals, although Congress, as shown above, was well aware of their imminence when it crafted the provision.[28] Section 614, as evidenced by its clear, unambiguous language, therefore, contemplated mandatory cable carriage of DTV signals transmitted by local television stations.

---

[25] 47 USC §534(b)(4)(B).

[26] 47 USC §534(h)(1)(B).

[27] *Id.*

[28] *See* Section 614(b)(4)(B), 47 USC §534(b)(4)(B).

By all rights, the inquiry ought end at this point.[29] Clear and unambiguous statutory language rules.[30] Nothing provides a better indication of the meaning of a statute than its plain language.[31]

---

[29] *Joy Technologies v. Secretary of Labor*, 99 F. 3d. 991, 995 (10 Cir. 1996)("If a statute's meaning is clear and unambiguous, the inquiry ends.").

[30] *Blum v. Stenson*, 465 U.S. 886, 896 (1984)(""[W]here resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.").

[31] *Meredith v. Bowen*, 833 F. 2d. 650, 654 (7th. Cir., 1987).

Two recent decisions of the Supreme Court illustrate and confirm the primacy of statutory language in interpretation of a statute. In *National Credit Union Administration v. First National Bank & Trust Co. et al.*, Nos. 96-843 and 96-847, 1998 U.S. LEXIS 1448; 66 U.S.L.W. 4134, 41 (decided February 25, 1998), the Court interpreted Section 109 of the Federal Credit Union Act. The Court based its interpretation strictly on the language of the statute, noting that "We have no need to consider §109's legislative history...." *Id.*, 1998 U.S. LEXIS 1448 at 35-36.The Court also applied and reemphasized the analytical approach commanded by *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984):

> Under that analysis, we first ask whether Congress has "directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Similarly, in *Quality King Distributors, Inc., v. L'Anza Research International, Inc.*, No. 96-1470, 1998 U.S. LEXIS 1606 (decided March 9, 1998), the Court shunned policy arguments and looked to the language of the Copyright Act itself in interpreting Section 109(a). The Court observed:

> The parties and their amici have debated at length the wisdom or unwisdom of governmental restraints on what is sometimes described as either the "gray market" or the practice of "parallel importation." In K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 100 L. Ed. 2d 313, 108 S. Ct. 1811 (1988), we used those terms to refer to the importation of foreign-manufactured goods bearing a valid United States trademark without the consent of the trademark holder. Id., at 285-286. We are not at all sure that those terms appropriately describe the consequences of an American manufacturer's decision to limit its promotional efforts to the domestic market and to sell its products abroad at discounted prices that are so low that its foreign distributors can compete in the domestic market. *But even if they do, whether or not we think it would be wise policy to provide statutory protection for such price discrimination is not a matter that is relevant to our duty to interpret the text of the Copyright Act.*

In this case, however, the pertinent legislative history confirms and supports the express language of the statute. As the Commission recognizes, the various reports accompanying the Cable Television Consumer Protection and Competition Act of 1992, essentially reflect the language of the statute.[32] The reports affirm that the Commission is directed to "conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems *will carry* television signals complying with such modified standards in accordance with the objectives of this section."[33] Thus, nothing in the legislative history of Section 614 may be read in any way to alter or explain away the plain language of the law itself.[34] The statute requires cable carriage of local television stations' DTV signals, and the Commission must write rules in accord with the statutory mandate.

Id., 1998 U.S. LEXIS 1606 at 32 [Footnotes omitted; emphasis supplied]. The courts have spoken to the Commission on this very point:

> While legislative history is undoubtedly one of the 'traditional tools' of which Chevron speaks, it is beyond cavil that the first step in any statutory analysis, and our primary interpretive tool, is the language of the statute itself.

American Civil Liberties Union v. Federal Communications Commission, 823 F. 2d 1554, 1568 (D.C. Cir. 1987).

[32]*Notice* at ¶2, n.1.

[33]H.R. Rep. No. 102-862, 102d Cong., 2d Sess. 67 (1992) [emphasis supplied]; *See also* H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 94 (1992); S. Rep. No. 102-92, 102d Cong., 1st. Sess. 85 (1991).

[34]In any event, an agency may not rely on legislative history to "trump clear and unambiguous statutory language."*American Civil Liberties Union v. Federal Communications Commission, supra,* 823 F. 2d at 1569. Indeed, the courts have that "leapfrogging ahead to the legislative history without carefully dwelling on the statute itself" invites error. *Id.,* 823 F. 2d. at 1568.

The Commission's flexibility under the statute is limited. It must adopt must carry rules, but may modify them to accommodate DTV.[35] Section 614 (and its legislative history) leaves the Commission no appreciable wiggle room in adopting DTV must carry rules for cable systems. Section 614 applies, subject to necessary technical revisions per Section 614(b)(4)(B).[36] Nonetheless, the Commission looks to Section 309(j) of the Balanced Budget Act, which describes the criteria for extension of the transition period in a particular market. However, Section 309(j) is silent with respect to DTV must carry rules. Only the legislative history of section 309 speaks to must carry for DTV signals. The conference report states in pertinent part:

> The conferees emphasize that, with regard to the inquiry required by section 309(j)(14)(B)(iii)(I) into MVPD carriage of local digital television service programming, Congress is not attempting to define the scope of any MVPD's "must carry" obligations for digital television signals. The conferees recognize that the Commission has not yet addressed the "must carry" obligations with respect to digital television service signals, and the conferees are leaving that decision for the Commission to make at some point in the future.[37]

In essence, Congress simply affirmed that Section 309 had nothing to do with the must carry requirements and acknowledged the obvious, namely, that the Commission had yet to deal with the matter, but would do so in the future. Section 309 and its legislative history, therefore, confers no flexibility beyond that granted in Section 614 and, in particular, Section 614(b)(4)(B).[38]

---

[35]ALTV urges the Commission not to overplay its hand.*Notice* at ¶13.

[36]The Commission correctly observes that Section 614 (along with sections 615 and 325) is the "starting point" of the analysis. *Notice* at ¶14.

[37]H.R. Conf. Rep. No. 105-217, 105th. Cong., 1st. Sess. 577, 143 *Cong. Record* H6175 (July 19, 1997).

[38]The only other statutory provision noted by the Commission (*Notice* at ¶8) is Section 336(b)(3) of the Act, 47 USC ¶336(b)(3). The provision expressly excludes ancillary and supplementary service provided on local television stations' DTV facilities from must carry protection under Section 614. *See Notice* at ¶8. The legislative history of the provision says no more:

With respect to paragraph (b)(3), the conferees do not intend this paragraph to

Moreover, nothing in Section 614 or its legislative history suggests any delay in the implementation of rules requiring cable carriage of DTV signals. No distinction is made between the transition and *post*-transition periods. Furthermore, Section 614 directed the Commission to begin this proceeding upon Commission's adoption of standards for DTV. [39] This hardly may be construed as a schedule designed to prompt adoption of rules as late as 2006.[40]

---

confer must carry status on advanced television or other video services offered on designated frequencies. Under the 1992 Cable Act, that issue is to be the subject of a Commission proceeding under section 614(b)(4)(B) of the Communications Act.

S. Rpt 104-230, 104th. Cong., 2d Sess. 161.

[39]Indeed, it states unequivocally that:

> *At such time as the Commission prescribes modifications of the standards for television broadcast signals*, the Commission *shall initiate* a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

47 U.S.C. §534(b)(4)(B)[emphasis supplied]. The Commission adopted standards in 1996. *Fourth Report and Order*, MM Docket No. 87-268, 11 FCC Rcd 17771 (1996). If anything, this proceeding places consideration of DTV must carry rules far behind the schedule contemplated in Section 614.

[40]Moreover, as the Court stated in *Turner II*:

> A fundamental principle of legislation is that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it. "An industry need not be in its death throes before Congress may act to protect it from economic harm threatened by a monopoly." Turner, supra, at 672 (STEVENS, J., concurring in part and concurring in judgment). As a Senate Committee noted in a Report on the Cable Act, "we need not wait until widespread further harm has occurred to the system of local broadcasting or to competition in the video market before taking action to forestall such consequences. Congress is allowed to make a rational predication of the consequences of inaction and of the effects of regulation in furthering governmental interests." Senate Report, at 60.
>
> *Turner II*, 1997 LEXIS 2078, 58.

In sum, Section 614 applies no less to DTV signals today than it applied to analog signals as of 1992. The Commission in Section 614(b)(4)(B) is accorded only sufficient discretion to modify the must carry rules to account for technical differences in the digital and analog signals.

B. DTV Must Carry Rules Involve No Infringement of Cable Operators' or Cable Programmers' First Amendment Rights.

Cable interests undoubtedly will warn the Commission that DTV must carry rules somehow would contravene their First Amendment rights. ALTV respectfully submits that those who challenge application of the must carry rules to DTV signals on such grounds must distinguish that application of the rules in some material way from their application to analog signals. ALTV will respond as needed to such arguments.

Now ALTV simply stresses that the interests served by application of the must carry rules to DTV signals are identical to those approved in *Turner II*. However, in the case of DTV signals, must carry not only preserves the benefits of this nation's system of free, broadcast television, but also promotes the timely transition from analog to DTV broadcasting with its attendant benefits for spectrum efficiency. Similarly, DTV must carry requirements protect against the same harms addressed by analog must carry requirements. Cable systems will have the same ability and incentives to deny carriage to some local television stations and will cause the same harm in loss of service for cable and noncable viewers alike -- again, with the added detriment that the transition to DTV will be stymied. Finally, the application of must carry rules to DTV signals, like their application to analog signals, easily may be tailored to prevent undue burdens on the cable industry.

Therefore, the Commission may act effectively to promote the interests at stake in the transition to DTV via application of must carry rules to local television stations' DTV signals without infringing the First Amendment rights of cable operators or cable programmers.

III. DIGITAL COMPATIBILITY

For over a decade, the broadcasting industry has labored to develop a digital television system for the United States. The Advisory Committee process was open to all industry groups. At the FCC's urging, the broadcasting industry worked out an arrangement with the computer industry. Rather than becoming part of the solution, the cable industry decided to take its own route to the digital world. Now, after a decade of effort, billions if dollars in private investment, and years of work by the FCC and others to create a workable table of allotments, the cable industry now raises compatibility concerns.

This should come as no surprise to the FCC. The cable industry knows that it still operates as the primary gatekeeper of video signals to the home. Make no mistake, the cable industry can control the roll out of local, free, over-the-air terrestrial digital television. Carriage on cable systems is one of the most significant elements in rolling out digital television.

The transition to the digital world will be extremely difficult. In the United States, television is an open system. There are very few regulatory standards forcing uniformity among broadcasters, cable operators, computer manufacturers and television set manufacturers. We have no doubt that each industry can raise numerous coordination problems that detail all the additional costs and expenses involved in trying to make their disparate digital systems compatible.

This Commission must rise above the fray and assume a proactive role in coordinating the transition. One of the key elements to coordinate is the carriages of local, digital off-air television stations on cable systems. Digital must carry is an essential component in this process. If the FCC does not act, then it is entirely possible that the digital systems created by the broadcast and cable industry may not become compatible. We urge the FCC not to be distracted by the details of technology. It must focus on the forest and not the trees. Adopting digital must carry rules will serve as a catalyst for all industries to work together, thereby benefitting all Americans..

IV. CARRIAGE AND RETRANSMISSION CONSENT ISSUES

A. Retransmission Consent

As the *Notice* correctly points out, Section 325 of the Communications Act generally prohibits cable operators and other multichannel video programming distributors from retransmitting the signal of a commercial television station without the prior consent of the station whose signal is being transmitted, unless the broadcaster has chosen must carry. According to one report, approximately 80 percent of commercial stations elected retransmission consent on at least one cable system during the 1993-1996 election cycle.[41]

At the outset, it is worth noting that the 80 percent figure is significant. It demonstrates that the overwhelming majority of local broadcast stations carried by cable operators are being carried pursuant to a mutual agreement. As a result, it would be improper to associate the carriage of these stations with the legal obligations imposed by any digital must carry requirements. Thus, when cable claims that must carry would impose undue burdens or create capacity shortages, it would be improper to consider local digital stations carried pursuant to retransmission consent agreements as part of the so-called "regulatory burden." To the contrary, the capacity set aside for the "retransmission consent" stations may be no different than the capacity used for any other cable networks.

According to the *Notice*, there appears to be little doubt that the retransmission consent provisions of Section 325 apply to digital signals. The issues concern the way in which retransmission consent will be implemented.

---

[41] *See* Charles Lubinsky, Reconsidering Retransmission Consent, 49 FEDERAL COMM. L.J., 99, 146 (1996).

1. Separate Elections for Analog and Digital Signals

The first issue concerns whether the retransmission consent process should apply separately to analog and digital broadcast signals.[42] ALTV believes that local stations should be permitted to make separate elections for each local broadcast signal. Thus, we would permit a local station to assert must carry rights for its digital signal, while at the same time asserting retransmission consent for its analog signal. The reverse should also be permitted. Finally, at the discretion of the station, a local broadcaster would also be permitted to make the same election for both stations.

It must be remembered that while both the digital and analog facilities are licensed to the same entity, and legally recognized to be an indivisible part of the same license, they will be providing separate and distinct signals. Retransmission consent directly involves the right to retransmit a *signal.* If two signals are being provided, it makes perfect sense to permit each signal the opportunity to select either retransmission consent or must carry. The fact that each signal falls under the same license would appear to be irrelevant.

Permitting separate elections would not unbalance the negotiation process. To the contrary, it would permit the parties to place an accurate value on each signal. Indeed, a cable operator may very well place a different value on a broadcaster's digital as opposed to analog signal. Moreover, the flexibility and types of services provided over the digital signal may not necessarily lend themselves to the types of negotiation which have typified analog retransmission consent arrangements to date.

Contrary to the FCC's observation, permitting separate elections should have no bearing on the FCC's duplication analysis.[43] The choice of retransmission consent or must carry involves

---

[42]*See Notice* at ¶34.

[43]*See Notice* at 21, n.93.

rights concerning the retransmission of signals, not the retransmission of programs *per se*. The FCC should not use the separate election concept as a bootstrap into the duplicate programming exception under the must carry rules. It would be highly inappropriate for the FCC to permit cable systems to deny carriage to a digital facility on the grounds that it duplicates the programming of its analog counterpart. This is especially true given the FCC's directives which compel stations to move towards a simulcast model. As a matter of economic reality, the objective of the station is to migrate its audience from the analog to the digital facility. Finally, applying the duplicate programming exception in this situation would completely undermine the must carry/retransmission consent election process by rendering one of the elections functionally meaningless.

2. Common Election for Entire Digital Signal

This issue is not new. In the context of analog retransmission consent/must carry, the Commission addressed the issue of whether a station could enter into retransmission consent negotiation for partial carriage of its signal. After considerable debate, the Commission concluded that local stations eligible for must carry must be carried in their entirety even though they are carried pursuant to retransmission consent contracts. The Commission concluded:

> Given this fact, and the congressional emphasis on full carriage for must carry qualified stations (discussed above), we believe the statutory provisions read in concert suggest that qualified must carry stations should, as a matter of policy, be carried in their entirety even if they are carried pursuant to retransmission consent....
>
> Thus, we conclude, based upon a reading of both Sections 614 and 325, that broadcast stations whose signals are entitled to must carry but are instead carried pursuant to retransmission consent are not permitted to negotiate for carriage of less than their entire signal.[44]

---

[44]*Memorandum Opinion and Order* , MM Docket No. 92-259, FCC 94-251 (released November 4, 1994) at ¶¶ 103, 105 (hereafter "*Must Carry Reconsideration Order*").

We believe a similar policy should be applied in the digital world. The statutory and policy concerns presented by digital retransmission consent and must carry are the same as in the analog context:

> Thus, at the very least, the Commission has the flexibility to require carriage in the entirety for qualified must carry stations carried pursuant to retransmission consent to ensure that the basic underlying objectives of the 1992 Cable Act relating to local broadcast service would be fulfilled. Otherwise the statutory goals at the heart of Section 614 and 325 -- to place local broadcasters on a more even competitive level and thus help preserve local broadcast service to the public -- could easily be undermined.[45]

Permitting cable operators to negotiate for partial signal carriage would place local broadcasting in an untenable position. As the FCC noted, the legislative history of the 1992 Cable Act was replete with discussions relating to the need for adequate carriage and the controlling market power of cable systems.[46] Both Congress and the FCC ensured that such market power did not overwhelm the ability of local broadcast stations to obtain carriage, and that the terms of carriage not be unreasonable.[47] Prior to passage of the 1992 Cable Act, there were instances where cable systems exerted their market power and "cherry picked" the programming of local stations. Such a policy, if extended into retransmission consent, could result in partial carriage, thereby harming the underlying economics of free, over-the-air television.

The same concerns are clearly present in the new digital world. There is no doubt that cable operators, which still exercise enormous market power at the local level, will seek to "cherry pick" the best digital programming from local stations. Such a result would not only undermine the

---

[45] *Must Carry Reconsideration Order* at ¶104.

[46] *Id.* at 101

[47] *Id.*

specific station involved, but when applied to the industry as a whole, would create a significant problem for the entire digital transition.

ALTV believes strongly that the FCC should apply its current analog policy to digital. This policy requires carriage of the entire signal for all must carry eligible signals, even if those signals are carried pursuant to retransmission consent agreements. In short, digital retransmission consent negotiations must involve the *entire* signal that is devoted to free broadcast services. If a station broadcasts several standard definition channels, it must negotiate for *all* of the channels.

We would observe one possible exception to the general rule. While these negotiations must cover the entire signal(s) of all channels delivered for free, pay subscription services need not be included in the bundle. Subscription based services are not, strictly speaking, "broadcasting" by definition.[48] Moreover, a fee based service may be considered ancillary and supplemental, hence not eligible for must carry under the 1996 Telecommunications Act. Thus, because such pay channels are not must carry eligible to begin with, it should be left up to the parties to determine whether such channels or services would be included in a retransmission consent agreement. This approach is entirely consistent with previous FCC decisions which found that analog stations not eligible for carriage under section 614 could negotiate for partial carriage.[49]

---

[48] *See, e.g., Subscription Video* , 2 FCC Rcd 101, *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988).

[49] *Must Carry Reconsideration Order* at ¶ 105 (Similarly, any station which is not eligible for must carry status under Section 614, because it is not a local commercial broadcast stations, or does not qualify under the definitions of Section 614, may negotiate for partial carriage.).

3. Exclusive Retransmission Consent Agreements

The *Notice* correctly observed that exclusive retransmission consent agreements between television broadcast stations and multichannel providers are prohibited.[50] Nonetheless, the Commission agreed to revisit this issue in three years.[51]

At this point in time, neither the FCC nor the industry is entirely certain how local over-the-air digital television will be rolled out. Digital conversion will be a very expensive proposition, costing stations up to 15 million dollars each. Given these uncertainties, it makes sense to give local stations the flexibility to negotiate for exclusive retransmission consent agreements. The increased revenue which may be derived from such arrangements could help stimulate a faster roll out of digital services. Moreover, the ability to offer an exclusive arrangement could help stations offer a more attractive package to local multichannel providers.

4. Election Period

As the *Notice* points out, the second election cycle ends on December 31, 1999. The *Notice* also asks whether the election cycle should be revised. ALTV does not see a compelling need to change existing election cycles. Local stations and cable operators have invested a significant amount of time negotiating existing retransmission consent agreements and/or selecting the must carry option. There is no need to disrupt these arrangements.

We believe the procedures that now govern new stations should be applied to digital facilities. Thus digital television stations should be able to make their initial election anytime between the 60 days prior to commencing operations or the 30 days after commencing broadcasts. The initial election would take effect 90 days after it is made. Of course, digital stations that are

---

[50] *Notice* at ¶38.

[51] *Must Carry Order* at ¶179.

already on the air should have a reasonable period of time, perhaps 30 days after adoption of a *Report and Order* in this proceeding, to make such an election.

Applying the new station procedures to digital facilities makes perfect sense. Digital facilities are in fact new stations within the definition of the Communications Act. Also, applying these procedures will allow for an orderly election process. It will permit both station and cable operators to negotiate or make must carry elections as each individual station comes on line.

B. Must Carry During the Transition Period.

ALTV urges immediate adoption of reasonable DTV must carry requirements to govern cable carriage of local broadcast stations' DTV signals during the transition period. The adoption of must carry rules applicable during the transition is dictated not only by Sections 614 and 615, but also by sound public policy considerations. These considerations arise from the traditional rationale for must carry requirements and gain added dimension from goals specific to the transition from analog to digital broadcasting. Haring observes:

> Among the statutory goals the Commission recognizes as informing its efforts in this proceeding are "the successful introduction of digital broadcast television and the subsequent recovery of the vacated broadcast spectrum" and "retention of the strength and competitiveness of broadcast television."[52] Realization of the later objective provided the principal economic rationale for the existing must-carry rules. The *same kinds* of economic considerations that supported imposition of must carry for analog signals also apply to must carry for digital signals. Realization of the *former* objective provides an important *additional* set of economic considerations that support imposition of digital must-carry rules. In addition to the benefits that derive from strong local broadcast service and broadcast-based competition, there are also important benefits to be derived on both the demand and supply side of the economy from successful innovation of digital broadcast television. Economic benefits also can be realized through productive utilization of recovered and reconfigured spectrum resources.[53]

Therefore, the Commission promptly ought adopt DTV must carry rules, which require carriage of all local television stations' DTV signals during the transition.

---

[52] *Op. cit.* at ¶1.

[53] *Economic Case* at 2.